

FEDERAL COURT OF AUSTRALIA

Singh v Minister for Immigration and Border Protection [2015] FCA 890

Citation:	Singh v Minister for Immigration and Border Protection [2015] FCA 890
Appeal from:	Singh & Anor v Minister for Immigration & Anor [2015] FCCA 1173
Parties:	TARSEM SINGH and HARJINDER KAUR v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL
File number:	SAD 133 of 2015
Judge:	BESANKO J
Date of judgment:	20 August 2015
Legislation:	<i>Federal Circuit Court Rules 2001</i> (Cth) r 16.01 <i>Migration Act 1958</i> (Cth) ss 5, 97 <i>Migration Amendment (2014 Measures No. 1) Regulations 2014</i> (Cth) <i>Migration Regulations 1994</i> (Cth) Schs 2, 6
Date of hearing:	6 August 2015
Place:	Adelaide
Division:	GENERAL DIVISION
Category:	No Catchwords
Number of paragraphs:	18
Counsel for the Appellants:	The Appellants appeared in person
Counsel for the First Respondent:	Mr P d'Assumpcao
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The Second Respondent entered a submitting notice, save as to costs

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 133 of 2015

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: TARSEM SINGH
 First Appellant**

**HARJINDER KAUR
Second Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
 PROTECTION
 First Respondent**

**ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent**

JUDGE: BESANKO J

DATE OF ORDER: 20 AUGUST 2015

WHERE MADE: ADELAIDE

THE COURT ORDERS THAT:

1. 1. The name of the second respondent be amended to read “Administrative Appeals Tribunal”.
2. 2. The appeal be dismissed.
3. 3. The appellants pay the first respondent’s costs of the appeal fixed in the sum of \$6,439.00.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY
GENERAL DIVISION**

SAD 133 of 2015

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

**BETWEEN: TARSEM SINGH
 First Appellant**

**HARJINDER KAUR
Second Appellant**

**AND: MINISTER FOR IMMIGRATION AND BORDER
 PROTECTION
 First Respondent**

**ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent**

JUDGE: BESANKO J

DATE: 20 AUGUST 2015

PLACE: ADELAIDE

REASONS FOR JUDGMENT

1 1 This is an appeal from an order made by the Federal Circuit Court of Australia (the “Federal Circuit Court”) on 5 May 2015 whereby the appellants’ application for judicial review of a decision of the Migration Review Tribunal (the “Tribunal”) was dismissed pursuant to r 16.01 of the *Federal Circuit Court Rules 2001* (Cth) (*Singh & Anor v Minister for Immigration & Anor* [2015] FCCA 1173). The Tribunal had affirmed a decision of a delegate of the Minister for Immigration and Border Protection (the “Minister”) not to grant the appellants’ application for Skilled (Provisional) (Class VC) visas. The first appellant, Mr Tarsem Singh, was the main applicant for the nominated visa (the relevant subclasses were Skilled – Graduate (subclass 485) and Skilled – Regional Sponsored (subclass 487)), and the second appellant, Ms Harjinder Kaur, was the secondary applicant and is the first appellant’s wife. It is sufficient for me to refer to the first appellant’s case and I will refer to him as the appellant.

The Decision of the Delegate

2 The appellant lodged his application for the visa on 27 June 2011 and he provided evidence of his English proficiency in the form of an International English Language Testing System (“IELTS”) report dated 27 August 2011. Upon verification of the report through the IELTS online verification system, the image of the person on the report was found to have distinct dissimilarities to the facial image on the IELTS result provided by the appellant. On 26 April 2012, a request was sent to the IELTS verification office to confirm the authenticity of the report, and, on 29 May 2012, information was received that the report had been cancelled due to an indication an imposter undertook the test on the appellant’s behalf. Following the issue of an invitation to comment to the appellant’s migration agent, the agent advised that the appellant did not know how the mismatch between the image on the system and the report had come about.

3 Clause 485.224 of Schedule 2 to the *Migration Regulations 1994* (Cth) (“the Regulations”) sets out the mandatory requirements for the grant of the visa. One of the requirements is that an applicant satisfies Public Interest Criterion (“PIC”) 4020. That criterion relevantly provides as follows:

- (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medial Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
 - (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made....
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
 - (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
- (5) In this clause:

Information that is false or misleading in a material particular means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

4 4 Section 97 of the *Migration Act 1958* (Cth) (“the Act”) sets out the definition of “bogus document”. It provides as follows:

“bogus document”, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

5 5 The delegate considered that there was evidence before the Minister that the appellant had given, or caused to be given, a bogus document or information that was false or misleading in a material particular in relation to the application. The delegate was not satisfied that the appellant met PIC 4020(1)(a) and rejected the appellant’s application.

The Decision of the Tribunal

6 6 On 10 August 2012, the appellant applied for a review of the delegate’s decision by the Tribunal. On 1 May 2014, the Tribunal wrote to the appellant to advise that there would be a hearing of the application for review on 29 May 2014 and to request that the appellant provide any additional documents or information by 22 May 2014. On 22 May 2014, the Tribunal received written submissions from the appellant. In those submissions, the appellant claimed that the testing centre had made an administrative error and that the delegate had denied the appellant procedural fairness by not advising the appellant that he was required to satisfy PIC 4020 in the invitation to comment. In his oral submissions before the Tribunal, the appellant reiterated the submission that the testing centre had made an administrative error.

7 7 The Tribunal found the appellant’s evidence to be unconvincing on three grounds. First, the Tribunal said that appellant had failed to produce any evidence of the administrative error alleged to have been made by the testing centre. Secondly, the Tribunal

said that the appellant had given oral evidence that he had sat the IELTS test on two further occasions in early 2014, but he had not produced a copy of either of those test results to the Tribunal. The Tribunal noted that, if it was to rely on the appellant's oral evidence of those test results, the 2011 test report recorded significantly higher scores than the scores attained in the tests sat in 2014. Thirdly, the Tribunal said that the appellant had not produced the original copy of the 2011 test report, despite the Tribunal's request that he do so. The Tribunal expressed its conclusion in relation to whether the appellant complied with PIC 4020(1) as follows (at [18]):

Notwithstanding the various claims and evidence raised by the applicant over the course of this matter, the Tribunal has been left with a reasonable suspicion that the applicant's IELTS test report submitted with his application is counterfeit and is therefore a bogus document within the meaning of s. 97(b). Further or alternatively, the Tribunal has been left with a reasonable suspicion that the applicant's IELTS test report purports to have been, but was not, issued in respect of the applicant and is therefore a bogus document within the meaning of s. 97(a). The evidence on the Departmental file makes clear that the applicant provided a copy of this IELTS test report to an officer as relevantly defined. It follows that the Tribunal is not satisfied that there is no evidence before it that the applicant has given, or caused to be given, to the Minister and/or an officer a bogus document in relation to the application for the visa. Therefore, the applicant does not meet PIC 4020(1).

8 The Tribunal also found (as had the delegate) that the appellant's
circumstances were not compelling or compassionate such that the requirements of PIC
4020(1) could be waived in accordance with PIC 4020(4).

9 The Tribunal also found that the appellant was not eligible for the alternative
visa (i.e., the Skilled – Regional Sponsored (subclass 487) visa) as the appellant had not paid
the applicable fee and there was no evidence the appellant met the primary criteria. The
Tribunal also found that there was no evidence the second appellant met the primary criteria
of either visa subclass.

The Decision of the Federal Circuit Court

10 The appellant applied to the Federal Circuit Court for judicial review of the
Tribunal's decision. The application contained a statement that the appellant sought review
on the ground that the testing centre had made an administrative error and "they are not
cooperating and admitting their mistake". The appellant made submissions to this effect at
the oral hearing. The appellant did not put any further evidence before the Federal Circuit
Court.

11 The Federal Circuit Court found that it was open to the Tribunal to make the finding it did on the evidence before it. The Federal Circuit Court noted that, while it may be that the appellant did not know how the mismatch between the image on the verification system and the report had come about, an application may be refused where there is evidence a bogus document was put before the delegate in circumstances that did not involve any dishonesty on the part of the applicant. In the circumstances, the Federal Circuit Court said that there was no evidence that the Tribunal had committed a jurisdictional error.

The Appeal to this Court

12 On 21 May 2015, the appellant appealed against the order of the Federal Circuit Court. His ground of appeal is as follows:

I wish to submit my appeal to court I request you to look into the issue of IELTS provided in my case. I have been informed that my IELTS result is fake and the photograph on it is someone else picture. I am still in process of inquiring this matter from British Council India that how it's possible and what has gone wrong in the whole case. As they are trying to keep themselves away from the disastrous mistake they have done in ruining my career, I am struggling to dig the truth out of the whole case. And these matters have not been taken into consideration during previous hearing.

13 The appellant did not add anything further in his oral submissions.

14 The first respondent submits that the ground of appeal identified in the notice of appeal does not disclose any error in the Federal Circuit Court's reasoning, and that the appellant has not otherwise advanced any argument which might suggest that the conclusions of the Federal Circuit Court are wrong, or that the Tribunal committed a jurisdictional error.

15 During the oral hearing, the first respondent drew to my attention the fact that the version of PIC 4020 annexed to the Tribunal's decision was the version introduced by the *Migration Amendment (2014 Measures No. 1) Regulations 2014* (Cth) ("Amended Regulations"), which came into force on 22 March 2014, as opposed to the version applicable when the appellant lodged his visa application. The effect of the Amended Regulations was to introduce new subclauses 2(a) and (b) into PIC 4020.

16 The first respondent submits that the Tribunal was correct to apply the Amended Regulations, because item 2701 of Schedule 6 to the Amended Regulations provides that the Amended Regulations apply to any application made, but not finally determined, before 22 March 2014. There is a definition in s 5 of the Act of the term, "finally

determined”, and it is to the effect that it is when a “decision that has been made in respect of the application is not, or is no longer, subject to any form of review” under, relevantly, Part 5, being the provisions dealing with applications to the Tribunal for review. The first respondent submitted that it followed that the Amended Regulations applied to the Tribunal’s review of the delegate’s decision. I think that submission is correct, and that the Tribunal did not err when applying the Amended Regulations to the appellant’s application.

17 17 I have carefully considered the Tribunal’s reasons, and I am not satisfied that there was any error, let alone a jurisdictional error, in the Tribunal’s decision.

18 18 I will make orders that the appeal be dismissed and that the appellant pay the first respondent’s costs of the appeal fixed in the sum of \$6,439.00. I will also make an order that the name of the second respondent be amended to read “Administrative Appeals Tribunal”.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 20 August 2015